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Supreme Court, U.S.
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No. 04-581

In The Supreme Court of the United States

TAXPAYERS OF MICHIGAN AGAINST CASINOS,

Petitioner,

v.

THE STATE OF MICHIGAN, NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, AND GAMING ENTERTAINMENT, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The Michigan Supreme Court

RESPONDENT GAMING ENTERTAINMENT, LLC'S, BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

The following restatement of the question presented in this case more accurately reflects the absence of a federal issue in Petitioner's Petition for a Writ of Certiorari:

Under the Michigan Constitution of 1963, was the Michigan Legislature required to enact legislation rather than act by concurrent resolution in binding the State of Michigan to a tribal-state gaming compact?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to this proceeding are Petitioner, Taxpayers of Michigan Against Casinos, and Respondents State of Michigan and Gaming Entertainment (Michigan), LLC. Respondent North American Sports Management Company, Inc., IV, was dismissed from this case by the Michigan Court of Appeals on August 12, 2002, and is no longer a party to this proceeding. (Court of Appeals Order, App. at 1).

Pursuant to Rule 29.6, Gaming Entertainment (Michigan), LLC, states that it is wholly owned by Full House Resorts, Inc. Full House Resorts, Inc., is publicly traded over the counter under the symbol FHRI OB.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Gaming Entertainment, LLC, respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari in this case.

JURISDICTION

Petitioner asserts that this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257(a), which provides the Court with the power to review:

> [F]inal judgments or decrees rendered by the highest court of a state . . . where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of . . . the United States. 28 U.S.C. § 1257(a).

As explained *infra*, however, this case does not call into question the validity of any treaty or statute of the United States, or of a statute of the State of Michigan, on grounds that it violates the United States Constitution or federal law. Nor does this case involve any title, right, privilege, or immunity set up or claimed under federal authority. Rather, this case involves the validity of an action taken by the Michigan Legislature tested in accordance with the *Michigan* Constitution of 1963. Specifically, the case asks whether, pursuant to the Michigan Constitution, the Legislature should have enacted a statute in approving

tribal-state gaming compacts, instead of acting by concurrent resolution. Since no question encompassed by 28 U.S.C. § 1257(a) is presented by this case, this Court lacks jurisdiction.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The central constitutional provision at issue in this case is Article IV, Section 22 of the Michigan Constitution of 1963, which states simply: "All legislation shall be by bill and may originate in either house." MICH. CONST., art. IV, § 22.

In its statement of the constitutional and statutory provisions involved in this case, Petitioner cites only subsection (a) of 18 U.S.C. § 1166. That full statutory section reads as follows:

[1] Amplifying the lack of a federal question in this case is Petitioner's failure to comply with Supreme Court Rule 14(1)(g)(i), which requires Petitioner in its Statement of the Case to specify "the stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts," and to quote portions of the record with specific references "so as to show that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari." S. Ct. R. 14(1)(g)(i). Petitioner's failure to comply with this rule is not surprising, given that the case at bar is and always has been one of state law. The question presented by Petitioner was not one "pressed or passed upon below," and was discussed by the Michigan Supreme Court only in *dicta*. *See Illinois v. Gates*, 462 U.S. 213 (1983) (noting that if a claim was "not pressed or passed upon below," this Court should decline to hear that claim). This Court should not grant the Petition on these tenuous grounds.

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include –

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of

criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

Finally, tribal-state gaming compacts are a creature of 25 U.S.C. § 2710(d), which due to its length is not reproduced here but is included in the Appendix at App. 30-38. S. Ct. R. 14(1)(f).

INTRODUCTION

This case presents no question regarding either the validity of any federal statute or the federal constitutionality of any state act. Instead, this case presents only issues regarding the manner in which the Legislature of the State of Michigan approved tribal-state compacts negotiated between Indian tribes and the Governor of Michigan pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. §§ 2701-2721, 18 U.S.C. §§ 1166-1168. As IGRA and the case law interpreting IGRA make clear, and as the Michigan Supreme Court recognized in its July 30, 2004, Opinion ("Opinion") (Opinion, Petition App. at 1-110), these issues are resolved pursuant to the Constitution and laws of the State of Michigan, and do not implicate any federal question over which this Court has jurisdiction. Throughout its October 28, 2004, *Petition for a Writ of Certiorari* ("Petition"), Petitioner Taxpayers of Michigan Against Casinos ("TOMAC") struggles to identify an important question of federal law that was decided by the Michigan Supreme Court in a way that conflicts with decisions of other state courts of last resort or of a United States Court of Appeals. Ultimately, TOMAC cannot do so. Moreover, TOMAC also cannot demonstrate any error in the Michigan Supreme Court's Opinion. Consequently, this Court should deny TOMAC's Petition.

STATEMENT OF THE CASE

I. Factual History.

This case concerns the constitutionality, pursuant to the *Michigan* Constitution, of the Michigan Legislature's method of concurrence in four Indian gaming compacts (the "Compacts") negotiated between and signed by then-Governor John Engler and four Indian tribes (collectively, the "Tribes"),[2] and approved by the Michigan Legislature by concurrent resolution in 1998. It is undisputed that the Tribes and the State of Michigan (the "State") negotiated and entered into the Compacts according to the requirements of IGRA. The Compacts represent the agreement between the State and the Tribes regarding the manner in which the Tribes will conduct Class III gaming (casino-style gaming) on their lands. 25 U.S.C. § 2703(8).

Pursuant to IGRA, Class III gaming activities are lawful on Indian lands if the gaming activities are: (1) properly authorized by the Indian tribe; (2) "located in a State that permits such gaming for any purpose by any person, organization, or entity;" and (3) "conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State."[3] 25 U.S.C. § 2710(d)(1). It

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[2] These tribes are the Little River Band of Ottawa Indians, the Pokagon Band of Potawatomi Indians, the Little Traverse Bay Bands of Odawa Indians, and the Nottawaseppi Huron Band of Potawatomi Indians. Two of these tribes have been operating gaming facilities since 1999, employing hundreds of people and contributing many millions of dollars to the local and state economies. (Opinion, Petition App. at 7 n.2).

[3] There is no dispute in this case that the tribes have properly authorized gaming or that the State of Michigan permits casino gaming. As Justice Kelly noted, the voters of the State of Michigan have authorized commercial casinos, the State operates a lottery offering a

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is through the compacting process that a tribe and a state may choose to extend some or all of the state's regulatory authority to grant the state jurisdiction to regulate tribal gaming activities. 25 U.S.C. § 2710(d)(3)(C). IGRA does not specify, however, the manner in which the State enters into a tribal-state compact. 25 U.S.C. § 2710(d)(3)(A) (requiring only that states "negotiate with [an] Indian tribe in good faith to enter into such a compact" if a tribe seeks to engage in Class III gaming).

In 1993, the Michigan Legislature, acting by concurrent resolution, bound the State of Michigan to gaming compacts with seven tribes, all of which are currently operating casinos. (Opinion, Petition App. at 66-68). Then, in 1997, the terms of the four Compacts at issue in this case were negotiated between the Tribes and Governor Engler. After changes were made to the Compacts in reaction to concerns raised by the Michigan Legislature, the Legislature approved the Compacts and bound the State to them via House Concurrent Resolution 115 ("HCR 115"). HCR 115 was passed by the Michigan House of Representatives on December 10, 1998, and by the Michigan Senate on December 11, 1998. HCR 115 received a majority of the votes of the legislators present and voting in each chamber, meeting the necessary threshold established by rules of each house of the Legislature for approval of a concurrent resolution.[4] (Opinion, Petition App. at 7 n.4).

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wide range of games, and the State allows pari-mutuel wagering on horse races. (Opinion, Petition App. at 34). The only aspect of 25 U.S.C. § 2710(d)(1) implicated by this case is the compact requirement.

[4] TOMAC's claim that HCR 115 was originally "defeated" in the House is inaccurate. (Petition at 5). TOMAC cites to no official record

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II. Procedural History.

TOMAC filed this action against the State on June 10, 1999, challenging the validity of HCR 115 and the Compacts as a matter of *state* constitutional law.[5] Specifically, TOMAC raised the following issues:

> (1) whether HCR 115 constituted "legislation" and therefore violated Mich. Const. 1963, art. 4, § 22, which requires that all legislation be passed by bill;
>
> (2) whether a provision in the Compacts regarding their amendment violated Mich. Const. 1963, art. 3, § 2, which establishes the separation of powers between the branches of government; and
>
> (3) whether HCR 115 constituted a local act in violation of Mich. Const. 1963, art. 4, § 29, which limits the use of local acts and contains certain voting requirements for such acts. (Opinion, Petition App. at 3).

After the trial court opined that the manner of approval of the Compacts violated the Michigan Constitution, the Michigan Court of Appeals reversed that decision and held that the Michigan Legislature's actions were constitutional. The Michigan Supreme Court accepted

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demonstrating defeat of HCR 115 – because no such record exists. In fact, the only recorded vote in the House was one of approval. (Opinion, Petition App. at 7 n.4). Furthermore, while it is true that the number of affirmative votes that HCR 115 actually received in the House of Representatives would not have been sufficient to pass a bill, it is pure supposition to claim that additional votes could not have been garnered had approval of the Compacts proceeded by enactment of a bill.

[5] Gaming Entertainment, LLC, ("GE") intervened as a party defendant pursuant to an order dated September 20, 1999. GE has a contractual agreement with the Nottawaseppi Huron Band of Potawatomi Indians, and has provided financial and other support in that tribe's efforts to open and operate a casino on its tribal lands.

TOMAC's application for leave to appeal. After oral argument, a 5-2 majority of the Michigan Supreme Court affirmed the decision of the Michigan Court of Appeals, ruling in favor of the State and GE.

The principal issue decided by the Michigan Supreme Court in this case was whether HCR 115 actually constituted "legislation" as that term is used in the Michigan Constitution. In deciding this question, the Michigan Supreme Court explored the meaning of the term "legislation" as a matter of Michigan constitutional law, ultimately concluding that a hallmark of "legislation" is that the Legislature is engaged in "unilateral regulation" (Opinion, Petition App. at 9-10), exercising a "power to speak on any subject *without any specified limitations.*" (Opinion of Justice Kelly, Petition App. at 38, emphasis in original, citations omitted). The Michigan Supreme Court then concluded, *inter alia*, that the plenary power of the United States Congress over Indian affairs and the compacting clause of IGRA, which requires the consent of the tribes to a gaming compact, deny the Michigan Legislature the degree of unilateral authority that under the Michigan Constitution would make its assent to the gaming compacts "legislation."[6] (Opinion, Petition App. at 9-19). The Michigan Supreme Court further found that 18 U.S.C. § 1166, which would make tribal gaming in the absence of a compact illegal under federal law if not conducted in conformity with "borrowed" state law,[7] did not provide the

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[6] The Michigan Supreme Court instead found that the Compacts are contractual in nature and held that the Michigan Legislature could exercise its inherent power to bind the State to a contract by passing a resolution. (Opinion, Petition App. at 15-22).

[7] TOMAC incorrectly asserts that "absent the compacts, the permitted gambling would be a crime under Michigan law." (Petition at 4). Rather, such activities would be prohibited by *federal* law, as the

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Michigan Legislature the scope of power and authority that might require that the Compacts be entered into through "legislation." (Opinion, Petition App. at 10-15). After analyzing both the meaning of the term "legislation" under state law, and the specific provisions of the Compacts, the Michigan Supreme Court ultimately determined that HCR 115 and the Compacts are *not* legislation requiring passage by bill.[8] (Opinion, Petition App. at 26).

State of Michigan lacks any authority to prosecute Indian gaming violations. 18 U.S.C. § 1166.

[8] The Michigan Supreme Court also found that the Compacts are not local acts under the Michigan Constitution, which are subject to different procedures and voting requirements than other bills. MICH. CONST., art. IV, § 29. The Michigan Supreme Court remanded to the Michigan Court of Appeals the issue of "whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers doctrine" in the Michigan Constitution. (Opinion, Petition App. at 26). In its Brief and Reply Brief filed with the Michigan Court of Appeals on remand, TOMAC argues that, under the Michigan Supreme Court's Opinion, the compacting power is held by the Legislature and cannot be delegated, and further argues that the initial Compacts as a whole must be invalidated on other state constitutional grounds involving the Legislature's appropriations power. (TOMAC Court of Appeals Brief, Excerpted at App. at 8-21). Although the Michigan Court of Appeals granted GE's Motion to Strike TOMAC's latest challenge to the compacts as a whole (GE Motion to Strike, App. at 22-28; Court of Appeals December 9, 2004, Order, App. at 29), TOMAC may, of course, appeal this decision. TOMAC's attempt to continue to litigate the validity of the Compacts in the remand thus threatens the finality of the Michigan Supreme Court's Opinion. TOMAC's arguments also contradict its contention in the Petition that Justice Markman's dissenting opinion correctly concluded that the Michigan Supreme Court's decision transformed the matter of tribal-state compacting "into the exclusive province of a single public official, the Governor." (Petition at 9). While it is possible that at some point a federal question may arise from the continued litigation of this case in the Michigan courts, it is clear that no federal question has yet been presented by any party or passed upon by the Michigan courts.

ARGUMENT

I. The Decision Of The Michigan Supreme Court Does Not Raise A Federal Question.

In its Petition, TOMAC attempts to manufacture a federal question where none exists and where it never asserted one before. While IGRA is a federal statute, and the Michigan Supreme Court discussed sections of IGRA, including 18 U.S.C. § 1166, in its Opinion, the central issue in this case is the manner in which the State of Michigan enters into an IGRA compact – an issue that the Michigan Supreme Court correctly held is resolved not by IGRA itself, but by state constitutional principles. (Opinion, Petition App. at 19-22). As various federal courts have correctly recognized: "IGRA says nothing specific about how we determine whether a state and tribe have entered into a valid compact. State law must determine whether a state has validly bound itself to a compact." *Pueblo of Santa Ana v. Kelly*, 104 F.3d 1546, 1557 (10th Cir. 1997); *see also Keweenaw Bay Indian Community v. United States*, 136 F.3d 469, 477 (6th Cir. 1998) (noting that the manner of state approval of a compact is "dependent on relevant state laws"); *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001) (evaluating the validity of tribal-state compacts based on principles of state constitutional law), *vacated on other grounds*, 305 F.3d 1015 (9th Cir. 2002) (finding that the tribes were indispensable parties to the case). Congress did not, and could not, dictate to the states the manner in which they were to enter into compacts with Indian tribes. U.S. CONST. amend. X; *Gregory v. Ashcroft*, 501 U.S. 452, 462 (1991) (noting that each state has the sole "constitutional responsibility for the establishment and operation of its own government") (citations omitted); *see also United*

States v. Mandel, 415 F. Supp. 1025, 1031 (D.C. Md. 1976) (noting that "the states under our federal scheme have, within broad constitutional limits, the exclusive power to allocate the functions of the executive, judicial, and legislative powers as they wish").

In fact, in its previous submissions in this case, TOMAC itself has repeatedly acknowledged that the issue presented in this case is one of state law. In its Brief on Appeal filed with the Michigan Supreme Court, TOMAC claimed that the Michigan Court of Appeals "incorrectly held that federal law determines the manner in which a state approves compacts," and *correctly* asserted that instead "state law determines the proper process for approval of a compact." (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 3). The point on which the parties to this case have differed is the *manner* in which *Michigan law* requires that the Compacts be approved. The issue has always been, and remains, one of state, not federal, law.

The Michigan Supreme Court's recognition that the primary issue in this case is one of state law is in accordance with the decisions of courts in other states, which also have found that questions regarding the manner in which a state enters into a compact with a tribe should be decided based on state, not federal, law. *See Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004); *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003); *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995); *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995); *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992). As Justice Markman noted in his partial concurrence and partial dissent in this case, the United States Court of Appeals for the Sixth

Circuit also has recognized that the manner in which a state binds itself to a tribal-state gaming compact is determined by reference to state law. (Opinion, Petition App. at 67 n.34). In *Keweenaw Bay Indian Community v. United States*, 136 F.3d at 477, the Sixth Circuit discussed the Michigan tribal-state compacts entered into in 1993 (and approved by the same legislative process utilized for the Compacts at issue here), and stated: "[A] governor's endorsement of a compact as required by the terms of a compact is coincidental, varied and dependent on the relevant *state laws*." (emphasis added).

Recognizing these principles, and in accordance with numerous other decisions on this point, the Michigan Supreme Court correctly concluded that the question presented by this case is a question of *state* constitutional law. (Opinion, Petition App. at 19-22). After thoroughly analyzing the Michigan Constitution, Michigan cases construing the meaning of the term "legislation" in the Michigan Constitution, and the specific terms of the Compacts, the Supreme Court found that the Michigan Constitution does not require the Michigan Legislature to enact a bill in order to approve gaming compacts with Indian tribes.[9] (Opinion, Petition App. at 9-22). Since the

[9] Although the Michigan Supreme Court did look to some federal law principles in reaching its conclusions regarding the definition of "legislation" under the Michigan Constitution (Petition at 7; Opinion, Petition App. at 24 (citing *Yakus v. United States*, 321 U.S. 414, 424 (1944))), the Court did not rely upon federal law in making this determination, and the federal cases examined by the Court are not controlling. Even though the Michigan Supreme Court reviewed the Compacts against the principles set forth in *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983), it did so only in response to the dissent and to demonstrate that, even if the test set forth in *Chada* were to be applied in determining whether the Compacts constitute

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question of the manner in which the Michigan Legislature assents to the Compacts is one of *state* constitutional law, the Michigan Supreme Court is and should be the final arbiter of this question.

The federal issue TOMAC attempts to create in its Petition is actually the Michigan Supreme Court's state constitutional analysis of the effect of the degree to which the State has jurisdiction and power over tribal gaming (which speaks to the state constitutional question of whether the power of the Michigan Legislature exercised in concurring in the Compacts was the Legislature's power of enacting "legislation" or another legislative power, the power to contract). In its Opinion, the Michigan Supreme Court properly characterized the balance of power between the State and the federal government with respect to the regulation of Indian gaming, and used this characterization as one of a number of reasons for finding that the Michigan Legislature did not enact "legislation" when it approved the Compacts. (Opinion, Petition App. at 10-15). Fundamentally, however, this case presents only questions

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legislation, "the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation." (Opinion, Petition App. at 23; Petition at 13 & n.1). Even dissenting Justice Markman agreed that the central consideration in this case is "which state actor has the power to bind the state to a legislative compact and according to which procedures *under state law*." (Opinion, Petition App. at 97). Ultimately, it is the Michigan Supreme Court's decision in this case (and prior state cases) that stands as the final word on the meaning of the term "legislation" in Michigan's Constitution. Even if the Michigan Supreme Court's views regarding decisions of this Court defining "legislation" were flatly wrong (which they are not), that would not transform this fundamental question of state constitutional law into an issue reviewable by this Court.

of state constitutional law. No federal question encompassed by 28 U.S.C. § 1257(a) exists and this Court, therefore, should deny TOMAC's Petition.

II. There Is No Conflict Regarding An Important Federal Question Between The Michigan Supreme Court's Decision And Decisions Of Other State Supreme Courts Or United States Courts Of Appeals.

Beyond claiming simply that the Michigan Supreme Court's decision presents an issue of federal law, TOMAC attempts to satisfy the requirements of Supreme Court Rule 10(b), asserting that the Michigan Supreme Court "has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals." S. Ct. R. 10(b). (Petition at 11). Specifically, TOMAC claims that "the Michigan Supreme Court's decision furthers a conflict among state supreme courts and creates a conflict with the Ninth Circuit Court of Appeals regarding the balance of State and Tribal power under IGRA." (Petition at 11). No such conflict actually exists, however. None of the state court cases relied upon by TOMAC addressed the federal issue TOMAC attempts to manufacture concerning 18 U.S.C. § 1166 – indeed, only one of those cases even mentioned this statute, and did so only in passing. Rather, each of the cases cited by TOMAC dealt with issues of state law relative to the manner in which those states entered into tribal-state gaming compacts under IGRA. Each court analyzed issues unique to each state's own constitution and involving distinct sets of facts, and no conflicting position with respect to any issue of federal law exists.

In fact, all of the cases cited by TOMAC explored the extent of the Governor's authority under each state's laws and constitutions, and *none* of these cases addressed whether a legislative resolution, rather than a bill, is a sufficient means of legislative action to bind a state to an Indian gaming compact. (Petition at 11-13). TOMAC does not identify any true split of authority in its Petition – because it cannot. Instead, the cases cited by TOMAC stand for the following propositions, none of which conflict with the findings of the Michigan Supreme Court in this case:

- In *Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047 (N.Y. 2003), the Governor of New York approved an Indian gaming compact without obtaining legislative approval in *any* form. The Court of Appeals of New York held that the Governor violated the separation of powers doctrine *of the New York State Constitution* by signing the compacts without legislative authorization or approval. *Id.* at 1059-60. The court carefully reviewed the specific provisions of the compact at issue, which, among other things, vested oversight of gaming operations in a state agency and assigned specific enforcement duties to the state police, and determined that the gaming compacts were "laden with policy choices" that required legislative approval. *Id.* at 1060-62. These compacts thus are fundamentally different from the Compacts at issue in this case, which, as the Michigan Supreme Court recognized, contain no provisions creating new state agencies or new state duties. (Opinion, Petition App. at 18). Moreover, the *Pataki* Court correctly held that "IGRA does not preempt state law governing which state actors are competent to negotiate and agree to gaming compacts. IGRA imposes on 'the State' an obligation to negotiate in good

faith (25 U.S.C. § 2710(d)(3)(a)), but identifies no particular state actor who shall negotiate the compacts; that question is left up to state law."[10] *Id.* at 1060. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004), the Wisconsin Supreme Court held that a state statute authorizing the Governor to enter into Indian gaming compacts on behalf of the state was valid, but that the Governor did not have authority, *under the Wisconsin Constitution*, to bind the state to terms in the compact that permitted the tribe to offer games that were otherwise prohibited by state law and waived state sovereign immunity.[11] While the court found that, *under Wisconsin law*, the Governor "does not possess unilateral authority to reach binding compacts with tribes on behalf of the state," the court also correctly recognized that other states "may allocate power among the branches in a manner different from Wisconsin," and thus might properly reach different results on this issue. *Id.* at 687-88. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *State ex rel. Clark v. Johnson*, 904 P.2d 11 (N.M. 1995), the Governor of New Mexico approved Indian gaming compacts without obtaining legislative approval in

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[10] This Court denied certiorari to review this case on November 17, 2003. *Pataki v. Saratoga County Chamber of Commerce, Inc.*, 124 S. Ct. 570; 157 L. Ed. 2d 430 (2003) (No. 03-392).

[11] The Compacts at issue here contain no such terms.

any form. The Supreme Court of New Mexico held that the Governor did not have authority, *under the New Mexico Constitution* to bind the state to Indian gaming compacts without legislative approval. The court noted that IGRA "authorizes state officials, acting pursuant to their authority *under state law*, to enter into gaming compacts on behalf of the state," and found that "the Governor lacked authority *under New Mexico law* to enter into the compact." *Id.* at 26 (emphasis added). 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *Narragansett Indian Tribe of R.I. v. Rhode Island*, 667 A.2d 280 (R.I. 1995), the Supreme Court of Rhode Island found that the Governor of Rhode Island lacked authority, *under the Constitution and laws of Rhode Island*, to bind the state to an Indian gaming compact without any involvement of the Rhode Island Legislature. Tellingly, the court heard and decided this issue as a certified question from the federal district court, in which litigation was pending regarding that tribal-state compact. *Id.* at 280. The question certified to the Rhode Island court was: "Whether, *under Rhode Island law*, the Governor had authority to act on behalf of and to bind the 'State' by executing [the tribal-state compact]." *Id.* (emphasis added). The court answered this question in the negative, based on Rhode Island's "particular state constitutional history and judicial interpretation." *Id.* at 282. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• In *State ex rel. Stephan v. Finney*, 836 P.2d 1169 (Kan. 1992), the Governor of Kansas negotiated and

signed a tribal-state compact without obtaining *any* type of approval from the Kansas Legislature. The compact contained provisions creating a State Gaming Agency to monitor the tribal gaming operation and to conduct investigations, requiring the Kansas Bureau of Investigation to perform background investigations on prospective gaming employees, and requiring tribal law enforcement to be trained by the state.[12] The Kansas court held that these provisions required legislative action, and that the Governor had no power, *under the Constitution and laws of Kansas*, to bind the state to the compact. *Id.* at 1181-85. The court also recognized that IGRA "is silent relative to who or what group negotiates [a tribal-state compact] on behalf of the State." *Id.* at 1179. 18 U.S.C. § 1166 was not relevant to the court's determination of this state law case and indeed was never even discussed by the court in rendering its decision.

• Finally, in *Am. Greyhound Racing, Inc. v. Hull*, 146 F. Supp. 2d 1012 (D. Ariz. 2001), a decision that was ultimately vacated by the Ninth Circuit on different grounds, 305 F.3d 1015 (9th Cir. 2002), the Arizona federal district court found, among other things, that "[t]he Governor's duty to negotiate compacts and the terms to which she may agree are set out in state law. State law questions about whether a state has validly bound itself to a gaming compact are not preempted [by IGRA]." 142 F. Supp. 2d at 1052. The court then went on to note that, *under Arizona law*, the Governor had overstepped state constitutional bounds in negotiating the compacts. *Id.* at 1069-72. 18 U.S.C. § 1166 was not relevant to the court's

[12] The Compacts at issue here contain no such terms.

determination of this state law case and indeed was mentioned only in passing.

Simply stated, none of the state cases cited by TOMAC present *any* conflict with the Michigan Supreme Court's Opinion in this case or any "split of authority" with respect to an issue of federal law. Each of these cases was decided based on specific provisions included in the compact or compacts at issue, and based on applicable *state* constitutional and statutory provisions governing the powers and responsibilities of the branches of state government. None of these cases decided an important question of federal law or established any "authority" for any principle of federal law, and none are "authority" concerning the Michigan Supreme Court's analysis of Michigan constitutional terms and principles. Moreover, none of these cases even addressed the specific issue presented by this case: Whether the state legislature, under the state's constitution, may bind the state to a compact by resolution, instead of by bill. No conflict exists between these cases, and these cases do not present any important question of federal law.[13] To the extent that the cases address a common issue at all, it is the following:

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[13] These cases also do not conflict with the decision in *Confederated Tribes of the Chehalis Reservation v. Johnson*, 958 P.2d 260 (Wash. 1998), in which the Washington Supreme Court found, in a case related to the public disclosure of records showing the payments made by tribes to defray certain community costs associated with the operation of tribal gaming facilities, that the Indian gaming compacts are agreements, "not legislation," and are interpreted as contracts. *Id.* at 267. As in the other cases cited by TOMAC, this case was decided pursuant to *state* law.

> What body of law determines the manner in which a state binds itself to a tribal-state gaming compact required under IGRA?

In response to this question, every court cited by TOMAC reaches the same answer as did the Michigan Supreme Court and the federal courts that have addressed this issue: "the substantive law of each *state*."

Finally, the Michigan Supreme Court's Opinion also does not conflict, as TOMAC contends, with the Ninth Circuit's decision in *Artichoke Joe's Cal. Grand Casino v. Norton* ("*Artichoke Joe's*"), 353 F.3d 712 (9th Cir. 2003), *cert. denied*, 125 S. Ct. 51 (2004). (Petition at 13-14). In *Artichoke Joe's*, the Ninth Circuit addressed the issue of whether California's constitution, which essentially provided a tribal monopoly within the state for certain forms of gaming, (1) violated IGRA, or (2) violated California card clubs' and charities' rights to equal protection as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution.[14] *Id.* In deciding that California's constitutional scheme and tribal-state gaming compacts complied with IGRA and comported with equal protection guarantees, the Ninth Circuit discussed 18 U.S.C. § 1166 and the manner in which it affects the balance of power between the states and the federal government in the regulation of tribal gaming. *Id.* at 721-22. As part of this discussion, the court noted that, *if no tribal-state gaming compact is in place*, a state "may enact laws and regulations concerning gambling *that have an effect* on Indian lands via § 1166," but that will be *enforced*

[14] Neither of these issues is presented in Michigan, where, as noted by Justice Kelly, the State has authorized full-scale commercial casino operations for non-Indians. (Opinion, Petition App. at 34).

by the federal government. *Id.* at 722 (emphasis added). Where a compact is in place, however, 18 U.S.C. § 1166 *by its express terms* does not apply to gaming conducted pursuant to that compact, and the state may regulate that gaming only as provided in the compact negotiated with the tribe. *See* 18 U.S.C. § 1166(c)(2).

Accordingly, the Michigan Supreme Court was entirely correct in stating that "[t]he only way the states can acquire regulatory power over tribal gaming is by tribal consent of such regulation in a compact." (Opinion, Petition App. at 13). *See also Gaming Corp. of America v. Dorsey & Whitney*, 88 F.3d 536, 545-47 (8th Cir. 1996) (similarly stating that "Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact"). Indeed, a state can *directly* regulate tribal gaming *only* if the tribe consents to such regulation as part of its compact with the state. No actual conflict exists, then, between the statements in *Artichoke Joe's* and the statements in the Michigan Supreme Court's Opinion and the opinion in *Gaming Corp. of America*.

Moreover, the issue before the Michigan Supreme Court had nothing to do with whether 18 U.S.C. § 1166 permits state laws to have an *effect* on Indian gaming, but rather dealt with whether the State has power, authority, and jurisdiction of a nature that requires the Michigan Legislature to approve tribal-state gaming compacts by legislation, under Michigan constitutional law.[15] The

[15] Contrary to TOMAC's assertion, the Michigan Supreme Court's Opinion does not in any way render 18 U.S.C. § 1166 a "nullity."
(Continued on following page)

Michigan Supreme Court's conclusion that legislation is not required to approve a compact does *nothing* to the provisions of IGRA and, as a state law question, does not merit review by this Court.

III. Contrary To Tomac's Arguments, The Compacts Are Not Authorized Pursuant To The Interstate Compact Clause, And Present No Issue Of National Significance.

After unsuccessfully attempting to manufacture a federal question and pointing to a nonexistent conflict between the opinions of state courts, TOMAC baldly asserts that tribal gaming compacts were authorized by Congress "through IGRA under the Compact Clause of the United States Constitution, art. I, § 10, cl. 3, the same provision that allows Congress to sanction interstate compacts," (Petition at 15), and that compacts are of such great national interest that this Court should resolve disputes over whether a state complied with its own Constitution and laws in entering into them. (Petition at 15-17). TOMAC's reliance on the Interstate Compact Clause of the United States Constitution is completely misplaced, however, and it therefore is not surprising that TOMAC is unable to cite *any* authority to support its view.

As this Court stated in *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 47 (1996), IGRA "was passed by Congress under the Indian Commerce Clause," U.S. CONST., art. I, § 8, cl. 3. In fact, in the lower court decision in that same case, the Eleventh Circuit rejected the

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(Petition at 15). In the absence of a binding compact, 18 U.S.C. § 1166 continues to borrow state law as federal law with respect to gaming.

argument that IGRA compacts were authorized under the Interstate Commerce Clause and held that "Congress enacted IGRA *solely* under the Indian Commerce Clause." *Seminole Tribe of Fla. v. Florida*, 11 F.3d 1016, 1026 (11th Cir. 1994) (emphasis added) (finding that "[t]he Supreme Court's jurisprudence on the Indian Commerce Clause bolsters our conclusion that Congress enacted IGRA solely under that authority") (quoting *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 192 (1989) ("The central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs.")), *aff'd*, 517 U.S. 44.

The Indian Commerce Clause provides: "The Congress shall have Power . . . To regulate commerce with . . . the Indian Tribes." U.S. CONST., art. I, § 8, cl. 3. Although it appears in the same text within the United States Constitution as the Interstate Commerce Clause, this Court has found the Indian Commerce Clause to be a distinct provision with "very different applications." *Cotton Petroleum Corp.*, 490 U.S. at 192. The Indian Commerce Clause is similarly distinct from the Interstate Compact Clause, and TOMAC can point to no authority suggesting otherwise. As neither IGRA nor the tribal-state compacts negotiated pursuant to IGRA arise under the Interstate Compact Clause, TOMAC fails in its attempt to establish that Interstate Compact Clause jurisprudence supports a grant of certiorari in this case.[16]

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[16] Nor does TOMAC succeed in its assertions that tribal-state gaming compacts themselves present an issue of broad national significance. TOMAC's arguments against gaming based on "socioeconomic considerations" are clearly one-sided and biased, and are irrelevant to the question of whether this Court should grant TOMAC's

(Continued on following page)

Furthermore, TOMAC's Interstate Compact Clause arguments are utterly at odds with TOMAC's arguments below. In its Brief on Appeal filed with the Michigan Supreme Court, TOMAC correctly argued that the Interstate Compact Clause is *inapplicable* to this case. (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 5-7). TOMAC there stated: "No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs." (TOMAC Mich. Supreme Court Brief, Excerpted at App. at 6). Moreover, TOMAC also correctly noted that this Court has recognized that the Interstate Compact Clause applies, and congressional approval of agreements between states or between states and foreign powers "is only required[,] for agreements that tend to encroach upon or interfere with the supremacy of the United States."

Petition. (Petition at 17-19). This case presents no issue of "great national importance" concerning Indian gaming or the regulation of Indian gaming. (Petition at 17). Questions regarding the scope of gaming, the classification of various games, or the appropriate balance of enforcement authority are simply not presented here. Contrary to TOMAC's claim, the Michigan Supreme Court's Opinion does not leave Indian gaming "essentially unregulated," but instead properly recognizes the State's role in regulating gaming – either through federal application of State law for gaming not governed by a compact, or through whatever regulatory balance is agreed upon between the State and the Tribe in a compact. (Petition at 19). Although the Michigan Supreme Court properly construed federal law in reaching its decision, the primary holding of its decision had nothing to do with federal law, instead deciding *pursuant to Michigan Constitutional law* the question of the manner in which the State binds itself to an Indian gaming compact. No matter how hard TOMAC now strains to claim otherwise, this case has always focused on the narrow issue of whether the State of Michigan, pursuant to its own Constitution and laws, properly bound itself to gaming compacts with Michigan Tribes. That issue of state law presents no issue worthy of review by this Court.

(TOMAC Mich. Supreme Court Brief, Excerpted at App. at 6 n.22 (citing *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 471 (1978); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981))). Since the Compacts at issue here do not interfere with federal supremacy, TOMAC's Interstate Compact Clause argument is misplaced.

Even if the Interstate Compact Clause could potentially be applied to the Compacts at issue here (which it cannot), the cases cited by TOMAC still do not counsel in favor of this Court reviewing the decision of the Michigan Supreme Court. As TOMAC notes in its Petition, this Court has recognized that it should review state courts' determinations of state law with respect to compacts only "in the limited field where a compact brings in issue the rights of other States and the United States." (Petition at 16 (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951))). This case, however, presents no issue regarding the interplay between the rights of the State and the rights of other states, or between the rights of the State and the federal government. While IGRA, which delineates the regulatory functions of the states and the federal government with respect to tribal gaming, provides a backdrop for this case, the actual issues presented by the case are merely questions of state law that have been determined correctly by the Michigan Supreme Court. This Court should decline to review that decision.

IV. The Michigan Supreme Court's Decision Was Correct And Should Not Be Disturbed By This Court.

In its Petition, TOMAC argues that IGRA ensures state regulatory and policy-making power over Indian gaming both through 18 U.S.C. § 1166, which TOMAC

argues provides the states with the power to regulate Indian gaming that is not conducted pursuant to a compact, and through 25 U.S.C. § 2710(d), which provides *inter alia* that Class III gaming may be conducted on Indian lands only pursuant to the terms of a tribal-state compact. (Petition at 21-23). TOMAC then argues that, since federal law grants the states regulatory power over Indian gaming, and since the Compacts at issue here "set forth an extensive regulatory framework governing tribal gaming activities," the Michigan Supreme Court erred in finding that federal law does not delegate regulatory power to the states of a nature such that, under Michigan's Constitution, the Compacts must be approved by the Legislature by bill (instead of by resolution). (Petition at 7-10, 21-25). TOMAC's argument, however, fails on several grounds.

First, TOMAC continues to fail to acknowledge that, while 18 U.S.C. § 1166 makes state law applicable to gaming on Indian lands in the absence of a compact, it does not give a state enforcement power over violations of state gaming laws on Indian lands. *See United States v. EC Invs., Inc.*, 77 F.3d 327, 330-31 (9th Cir. 1996) (finding that because 18 U.S.C. § 1166 "effectively grants the federal government exclusive jurisdiction over California's gambling laws regarding Class III gaming conducted on Indian lands without a Tribal-State compact, California lacks the jurisdiction to prosecute a violation" of its state law on an Indian reservation); *see also United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991) (cited by TOMAC, yet involving a *federal*, not state, prosecution for gaming violations). Instead, 18 U.S.C. § 1166 "incorporates state laws as the *federal* law governing all nonconforming gambling in Indian country," and provides that "the power

to enforce these newly incorporated laws rests *solely* with the United States." *United Keetoowah Band of Cherokee Indians v. Oklahoma*, 927 F.2d 1170, 1177 (10th Cir. 1991) (emphasis added). The Michigan Supreme Court correctly recognized these principles in its Opinion. (Opinion, Petition App. at 14-15).

When a state and a tribe enter into a compact for Class III gaming, 18 U.S.C. § 1166 by its own terms *no longer applies* to gambling activities conducted pursuant to the terms of the compact. *See* 18 U.S.C. § 1166(c)(2) (stating that gambling for purposes of this section does not include Class III gaming conducted pursuant to a compact that is in effect). Instead, a state's criminal and civil laws apply to gaming activity conducted pursuant to a compact only as agreed upon by the compacting parties. 25 U.S.C. § 2710(d)(3)(C). Although TOMAC asserts that "an appropriate compact *will* apply state regulatory law to Indian gaming," (Petition at 22, emphasis added), the application of state law is not in fact required, and takes place only upon the election of both the state and the tribe. 25 U.S.C. § 2710(d)(3)(C). IGRA gives states a regulatory enforcement role with respect to tribal gaming *only* where a tribe cedes such jurisdiction through a compact. *Id.* In the Compacts at issue in this case, the parties did not agree to extend state regulations or jurisdiction over tribal gaming. (Opinion, Petition App. at 18).

Given that the Compacts here cede no regulatory authority to the State, the Michigan Supreme Court correctly decided that, under provisions of the *Michigan* Constitution, the Michigan Legislature lacked unilateral regulatory power over tribal gaming and the Legislature's approval of the compacts was not "legislation." In its Petition, TOMAC argues that the Compacts "change

Michigan gaming laws that apply to specific Indian lands" by providing standards for the hiring of casino employees, the types of games that may be played and by whom, recordkeeping and reporting requirements, and other standards. (Petition at 3-4; 13 n.1; 23-24).[17] As the

[17] TOMAC argues that these sections of the Compacts "impact State public policy, create new rules and obligations that bind those outside the legislature, and replace the existing state laws and regulations with the terms of the compacts themselves." (Petition at 3). These statements not only are incorrect on their face, but they also appear to be based upon the four-factor test articulated in *Immigration & Naturalization Serv. v. Chada*, 462 U.S. 919 (1983), in which this Court set forth the factors to be analyzed in determining whether Congress, upon delegating authority to an executive agency, could retain the right to approve or disapprove actions of that agency. In its Opinion in this case, however, the Michigan Supreme Court specifically found that the *Chada* test does not apply to the Michigan constitutional determination of whether the Compacts constitute legislation requiring legislative approval by bill. (Opinion, Petition App. at 22-23). Even if this test is applied, however, the court found that "the factors do not demonstrate that the Legislature's approval of the compacts was an act of legislation." (Opinion, Petition App. at 23-26). Instead of relying upon federal law to define the meaning of the term "legislation" in the Michigan Constitution, the Michigan Supreme Court properly looked to state law to define legislation as "unilateral regulation," and found that the Compacts were more properly described as contracts, and not legislation. (Opinion, Petition App. at 9-10). The Michigan Supreme Court also found that it was appropriate for the Court to defer to the discretion of the Legislature in approving the Compacts by resolution since "[u]nlike the federal constitution, [the Michigan] Constitution 'is not a grant of power to the legislature, but is a limitation upon its powers.' *In re Brewster Street Housing Site*, 291 Mich. 313, 333; 289 N.W. 493[, 500] (1939). Therefore, 'the legislative authority of the state can do anything which it is not prohibited from doing by the people through the Constitution of the State or the United States.' *Attorney Gen. v. Montgomery*, 275 Mich. 504, 538; 267 N.W. 550[, 563] (1936)" (Opinion, Petition App. at 19). *See also Young v. City of Ann Arbor*, 255 N.W. 579, 581 (Mich. 1934) (stating that the state "legislative power, under the Constitution of the State, is as broad, comprehensive, absolute and unlimited as that of the Parliament of England, subject only to the Constitution of the

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Michigan Supreme Court held, however, the compacts "only set forth the parameters within which the tribes, as sovereign nations, have agreed to operate their gaming facilities. Under the terms of the compacts, the tribes themselves, not the state, regulate the conduct of class III gaming on tribal lands. The Legislature has no obligations regarding the regulation of gaming whatsoever, nor can the state unilaterally rectify a violation of the compacts." (Opinion, Petition App. at 16-17).

Moreover, the Michigan Supreme Court also correctly found that any restrictions imposed by the Compacts with respect to the operation of gaming activities "are not restrictions on the citizens of Michigan; rather, they are restrictions only on the *tribes*. The compacts provide the minimum requirements that the *tribes* agree to use in hiring and admitting guests to the casinos. The state has no power to regulate the casinos or enforce violations of the compact, but must use the dispute resolution procedure provided in the compacts if a violation occurs." (Opinion, Petition App. at 17-18). Unlike the compacts at issue in other cases cited by TOMAC, these Compacts do not create any new state agencies,[18] authorize additional forms of gaming not already permitted within the State, or

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United States and the restraints and limitations imposed by the people upon such power by the Constitution of the state itself).

[18] While TOMAC continues to assert that the Compacts obligate local units of government to create local revenue sharing boards to accept tribal payments (Petition at 24 n.7), the Michigan Supreme Court correctly found that this provision of the Compacts also does not constitute state regulation, as the affected local units of government are merely third-party beneficiaries to the Compacts and cannot be contractually bound to do *anything* by a contract to which they are not parties. (Opinion, Petition App. at 17).

permit the State to exercise other regulatory authority over tribal gaming operations.[19] Accordingly, the Michigan Supreme Court's analysis of the Compacts was correct, and this Court should decline to review that analysis.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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December 29, 2004

[19] *See* Part II, *infra*.

Court of Appeals, State of Michigan

ORDER

Taxpayers of Michigan v State of Michigan	Harold Hood Presiding Judge
Docket No. 225017	Donald E. Holbrook, Jr.
LC No. 99-090195-CZ	Donald S. Owens, Judges

The Court orders that the motion to dismiss one of the intervening parties (NORAM) and to withdraw as counsel is GRANTED.

/s/ Harold Hood
Presiding Judge

[LOGO] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 12 2002
Date

/s/ Sandra Schultz Mengel
Chief Clerk

IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals (Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees. /

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL – APPELLANT

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

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* * *

B. The Court of Appeals erred in deciding that federal law rather than state law determines the manner in which IGRA compacts are approved.

The Court of Appeals also incorrectly held that federal law determines the manner in which a state approves compacts. Specifically, the court erred in ruling that (1) IGRA expressly authorizes the State legislature to approve a compact by concurrent resolution, and (2) the federal Compact Clause authorizes approval by concurrent resolution. To the contrary, state law determines the proper process for approval of a compact and requires that the compacts be approved as legislation.

1. State constitutional law determines how states enter into compacts.

State law not only sets gambling policy, it also determines how a state can validly "enter into" and bind itself to a gambling compact under IGRA. The question of whether state or federal law determines the manner in which a compact is approved was squarely addressed in *Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557-1558 (CA

10, 1997). *Pueblo of Santa Ana* involved a declaratory action brought by Indian tribes from the State of New Mexico for a determination that certain compacts approved by the Secretary of the Interior pursuant to IGRA were valid even though the governor of the State of New Mexico lacked authority to enter into the compacts. *Id.* at 1548. The Tenth Circuit determined that a compact, even if approved by the Secretary of the Interior, is invalid unless it is first properly approved by a state. *Id.* at 1555. The court then applied U.S. Supreme Court precedent to conclude that in the absence of specific guidance in IGRA, *state law* would determine the proper procedure for executing valid compacts. *Id.* at 1557-1558.

The California Supreme Court recently agreed: "[for a compact] [t]o be 'entered into' [under IGRA] by the state and the tribe means to be 'entered into' validly in accordance with state (and tribal) law." *Hotel Employees,* 21 Cal 4th at 612; *accord, Saratoga County Chamber of Commerce, Inc v Pataki*, 712 NYS2d 687, 696; 275 AD2d 145 (NY App Div, 2000) (ruling that state law determines whether a state has validly bound itself to a compact); *see also New Mexico v Johnson,* 120 NM at 578 (ruling that the United States Congress cannot expand the authority of a state or its officials over and above the authority granted by a state's constitution).

2. IGRA does not determine how a compact is approved.

The Court of Appeals erroneously interpreted IGRA as expressly authorizing a state's approval of a compact by resolution. Ct of Appeals Op at 12-13 (App at 133a-134a). This is a simple misreading of the statute. *See* 25 USC

2710(d). While IGRA specifies that the *Indian tribe* may approve a compact by resolution, *see* 25 USC 2710(d)(1)(A), it is silent as to how a state must approve of the compact, *see* 25 USC 2710(d)(1)(C). Even Appellee, the State of Michigan, admits: "IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is determined by state law. *See Pueblo of Santa Ana v Kelly,* 104 F3d 1546, 1557 (CA 10 1997)." (State of Michigan's Brief in Opposition to Application for Leave to Appeal at 5 n 3.) *See also Saratoga County*, 2003 NY LEXIS 1470, *33 (ruling that IGRA leaves to state law who will negotiate and agree to a compact).

3. The federal Compact Clause is also inapplicable.

In ruling that concurrent resolution was an appropriate method of approving these compacts, the Court of Appeals also relied heavily upon cases interpreting the federal Compact Clause to conclude that approval by bill was unnecessary. Citing *United States Steel Corp v Multistate Tax Comm'n*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), the court noted, "The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than necessity. The true test of congressional approval occurs when powers of an entity are usurped." Ct of Appeals Op at 13 (App at 134a). While the federal Compact Clause may address the question of whether and how the U.S. Congress must

approve a compact, it does *not* address the way in which a *state* must *enter into* a compact.[22]

The *Multistate Tax Commission* opinion verifies that the federal Compact Clause is inapplicable here. The case involved the issue of whether a compact between states, establishing a Multistate Tax Commission, required approval by the United States Congress. *Multistate Tax Comm'n,* 434 US at 454. The Supreme Court concluded that Congressional approval was not required because the compact did not impermissibly encroach upon federal supremacy. *Id.* at 472-473. What was not in dispute, and what the Court *did not address,* was the mechanism by which the states had entered into the compact. In fact, each state that had entered into the compact, including Michigan, had done so by way of legislation. *Id.* at 454 n 1; *see also* MCL 205.581.

No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs. *See, e.g., Pueblo of Santa Ana,* 104 F3d at 1557-1558. Under Michigan law, the appropriate test for determining whether the compacts

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[22] The federal Compact Clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power. . . . " US Const, art I, § 10, cl 3. A literal reading of the clause would require the states to obtain congressional approval of some form before entering into any agreement among themselves. The U.S. Supreme Court, however, has eschewed such an approach and held that congressional approval of a compact is only required for agreements that tend to encroach upon or interfere with the supremacy of the United States. *See Multistate Tax Comm'n,* 434 US at 471, *Cuyler v Adams,* 449 US 433, 440; 101 S Ct 703; 66 L Ed 2d 641 (1981).

constitute legislation, requiring approval as a bill, is set forth in *Blank*. The Court of Appeals' reliance upon *Multistate Tax Commission*, instead of *Blank*, is clear error.

* * *

STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and LAURA BAIRD, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiff/Appellees/ Cross-Appellants,

v.

STATE OF MICHIGAN,

Defendant/Appellant/ Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, a Florida corporation, GAMING ENTERTAINMENT (Michigan), LLC, a Delaware limited liability company, and LITTLE TRAVERSE BAY BAND OF ODAWA INDIANS,

Intervening Defendants/ Appellants/Cross-Appellees. /

Court of Appeals No. 225017

Ingham County Circuit Court Case No. 99-90195-CZ

PLAINTIFFS' SUPPLEMENTAL BRIEF ADDRESSING COMPACT AMENDMENT

ORAL ARGUMENT REQUESTED

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* * *

BASIS OF JURISDICTION

This Court has jurisdiction by virtue of the Michigan Supreme Court's remand in its decision of July 30, 2004,

Taxpayers of Michigan Against Casinos v State, 471 Mich 306; 685 NW2d 221 (2004) [hereinafter, "*TOMAC*"]. This Supplemental Brief Addressing Compact Amendment is submitted pursuant to this Court's Order of October 8, 2004.

STATEMENT OF QUESTIONS PRESENTED

1. Does the amendment provision in the tribal-state gaming compacts, which purports to empower the Governor to amend the compacts unilaterally, violate the separation of powers clause, Const 1963, art 3, § 2, thereby voiding the amendment provision?

The Trial Court said: Yes.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

2. Does the Governor's Amendment to the tribal-state compact with the Little Traverse Band of Odawa Indians appropriate state funds without a legislative enactment is violation of the separation of powers clause, Const 1963, art 3, § 2?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

3. Does the Supreme Court's holding that the tribal-state compacts are valid contracts, and

therefore neither a legislative enactment (as TOMAC had urged) nor an instrument of gratuitous transfer (as this Court held in *Tiger Stadium*), mean that the original terms of the tribal-state compacts appropriate state funds without a legislative enactment in violation of the separation of powers clause, Const 1963, art 3, § 2?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

4. If the original or amended payment term of a tribal-state compact is both constitutionally invalid and non-severable, is the underlying amendment or compact void in its entirety?

The Trial Court did not address this issue.

This Court did not address this issue.

The Michigan Supreme Court did not address this issue.

Plaintiffs say: Yes.

INTRODUCTION

This proceeding arises out of the Governor's unilateral decision in July 2003 to create a new casino within the State of Michigan, and to appropriate, in her sole discretion, the revenue-sharing payments attributed to both the new and an existing casino. The Michigan Legislature purported to delegate this sweeping amendment power to

the Governor when it approved a resolution ratifying the underlying compact and three others like it.

In an Opinion dated July 30, 2004, the Michigan Supreme Court held that the underlying compacts were valid contracts, and therefore neither legislation subject to the presentation and enactment requirements of the Michigan Constitution (as TOMAC had urged) nor an instrument of gratuitous transfer (as this Court held in *Tiger Stadium*). The Supreme Court stopped short of analyzing the significance of its holding for the validity of the amendment power granted to the Governor in the compacts, and remanded the case to this Court for a ruling, in the first instance, on these questions.

The broad and virtually unconstrained power to amend that the Legislature purportedly delegated to the Governor violates the Michigan Constitution's strict separation of powers. The Legislature may not delegate its power to the executive without adequate constraints imposed by law – something that was not done here. The Governor's specific decision in her amendment to redirect the casino revenue sharing payments in her sole discretion also separately violates the separation of powers doctrine. It is well settled that the Legislature is the only governmental branch authorized to appropriate State funds, and that it must do so by law, not by resolution – again, something that was not done here. Accordingly, both the amendment power on its face, and the particular terms of the Governor's Amendment to the Odawa compact, are constitutionally invalid.

But there is something more fundamental at stake on this remand too: namely, the validity of the underlying compacts themselves now that the Supreme Court has

concluded the compacts are valid contracts, and neither legislation nor instruments of gratuitous transfer. Valid contracts require consideration. This means that both parties to a valid contract give some things up in exchange for receiving other things. The necessary implication of the Supreme Court's holding is that the State of Michigan did give something up in the compacting process, for there is no other way for the compacts to be valid contracts, as the Supreme Court held. But this, in turn, means that this Court's earlier decision in *Tiger Stadium* has been effectively overruled, and that the payment terms of not just the Governor's Amendment but also the original compacts are constitutionally infirm as a violation of the separation of powers. Because the payment terms of the compacts are expressly non-severable, the entire compacts must necessarily fail.

Accordingly, by faithfully applying the holding of the Supreme Court, this Court should declare void not only the Governor's purported July 2003 amendment, but also the four underlying gaining compacts as well

* * *

ARGUMENT

The amendment provision of the compacts purports to give the Governor unconstrained power to deal with the compacting Tribes on the number of casinos allowed to each Tribe, the amount of money (if any) payable by the Tribes to the State and to local governments, the legal age for gambling in Tribal casinos, the disposition of tens of millions of dollars (or more) in Tribal gambling payments, and a host of other critical issues. By the terms of the compacts themselves, the Legislature has no power to approve – or even consult on – any proposed amendments.

Rather, the Governor acts unilaterally for the State and merely informs the Legislature of her decisions after she binds the State to them.

The Michigan Constitution does not permit such an audacious abdication of power by the Legislature to the Governor. The amendment provision of the compacts is facially invalid because Article 3, Section 2 of the Michigan Constitution mandates separation of powers between the three branches of State government. This separation does not permit the Governor to act on her own to bind the State to compact terms never approved by the Legislature, and it does not permit the Legislature to delegate authority to the Governor without sufficient guidelines for its exercise.

In addition, the redirection of State monies the Governor effectuated through the Amendment is an appropriation of State funds, a right that the Legislature alone must carry out "by law." Const 1963, art 9, § 17. But no law has ever approved the Governor's Amendment (the Governor acted unilaterally) or, for that matter, the underlying compacts (the Legislature acted by resolution, not statutory enactment). Because the monetary terms of the original compacts, including the Odawa compact as amended, are expressly non-severable, Compact (Ex A) § 12(E), the defect in the monetary provisions of the Governor's Amendment invalidates the Amendment in its entirety. Moreover, based on the Supreme Court's holding that the original compacts themselves are valid contracts, and neither legislation nor gift, the underlying compacts themselves are invalid for the same reason.

* * *

II. The Governor's Amendment Also Violates the Separation of Powers Clause Because It Improperly Appropriates State Funds – a Power Reserved Exclusively to the Legislature.

The original compacts require that the Tribes make 8% of net win payments to the Michigan Strategic Fund ("MSF"). Compact (Ex A) § 17. The Governor's Amendment changes these payment terms. In exchange for an additional casino, the Governor's Amendment provides for new payments. Even more significant, the Governor's Amendment removes the MSF as the recipient, and simply provides for "[p]ayment to the State, as directed by the Governor or designee." Compact Amendment (Ex C) § 17(C). Therefore, the Governor, with no input or ratification from the Legislature, granted herself the open-ended and unlimited power to direct the flow of this "important revenue to the State." Compact (Ex A) § 17(A). The separation of powers clause precludes such conduct, because the power to appropriate State funds is reserved exclusively to the Legislature. *Civil Service Comm of Michigan v Auditor General,* 302 Mich 673, 682; 5 NW2d 536 (1942) ("The control of the purse strings of government is a legislative function.").

A. The Governor's Amendment is an Unconstitutional Appropriation of State Funds in Violation of the Separation of Powers Doctrine.

The Governor does not have the unilateral authority to direct and control State funds. *See International Union v State of Michigan*, 194 Mich App 489; 491 NW2d 855 (1992). To the contrary, this is a job reserved exclusively to the Legislature: State funds must be appropriated "by

law" in accordance with Article 9, Section 17 of Michigan's Constitution. In the words of this Court: "The legislature enacts laws and appropriates funds. The executive branch of the government executes the laws and spends appropriated funds for designated purposes." *International Union,* 194 Mich App at 501. This separation of powers protects the legislative prerogative to control the purse strings of government:

> [t]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and *not to be surrendered or abridged,* save by the Constitution itself, without disturbing the balance of the system and endangering the liberties of the people. The right of the legislature to control the public treasury, to determine the sources from which the public revenues shall be derived and the objects upon which they shall be expended, to dictate the time, the manner, and the means both of their collection and disbursement, is firmly and inexpugnably established in our political system.

Civil Service Comm, 302 Mich at 682; 5 NW2d 536 (1942) (emphasis added).

The Governor's Amendment falls outside this Court's holding in *Tiger Stadium Fan Club v Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *app den. by Hart v Engler,* 453 Mich 866; 522 NW2d 180 (1996). *Tiger Stadium* dealt with seven Indian gambling compacts[5] negotiated by

[5] These compacts did not include the four compacts at issue in this case.

Governor Engler as part of a settlement of federal litigation against the State. This Court determined that the compact payments in that case were not State funds subject to the appropriation clause, because (1) the funds were simply "gratuitous payments" in exchange for which the State gave up nothing, and (2) the "gratuitous payments" were made with a specifically designated purpose, namely, contribution to the MSF.[6]

The Governor's Amendment is critically different in both respects. First, the Governor obviously gave something up in exchange for the new payment terms: a second casino. Second, she removed the specifically designated purpose tied to the payments and substituted instead a generic obligation to pay "the state" in whatever way she alone decided to direct. Compact Amendment (Ex C) § 17(C) (all casino revenue-sharing payments are to go "to the State, as directed by the Governor or designee"). Accordingly, under the rules announced by *Tiger Stadium*, the new payment provisions of the Governor's Amendment plainly amount to an appropriation of State funds without the constitutionally required "appropriation[] made by law," Const 1963, art 9, § 17, in violation of the separation of powers.[7] The payment provision of the Governor's Amendment is therefore void.

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[6] The Court relied on the specific designation to take the payments outside the statutory rules governing general purpose gifts. *Tiger Stadium*, 217 Mich App at 452. *See* MCL 21.161. These rules require that the Governor report monies received by "the State" to the Legislature for ultimate disposition as provided by law.

[7] Both the Michigan Senate Majority Leader and the Michigan Appropriations Chair agree that the Governor's diversion of funds through the Compact Amendment amounts to an illegal appropriation. *See* TOMAC v. Michigan, Brief of Amici Curiae Senate Majority Leader

(Continued on following page)

B. The Supreme Court's Holding in *TOMAC* that State-Tribal Compacts are Valid Contracts, and Neither Legislation nor Gift, Effectively Overrules *Tiger Stadium*, and Makes All Compact Payments – Whether to the MSF or Otherwise – Subject to Legislative Control by Appropriation.

This Court in *Tiger Stadium* rested its holding that compact payments were not subject to appropriation on the theory that the State "gave up nothing" and did not "concede or give away anything" in exchange for the payments. *Tiger Stadium,* 217 Mich App at 449; 553 NW2d 7. Because there was no exchange between the parties, this Court reasoned, the casino payments merely amounted to "gifts," "grants," or "gratuitous payments" designated for a specific purpose, which are not subject to appropriation. *Id.* at 453-454; 553 NW2d 7. The logical converse is that if the State *had* given something in exchange, the payments would be State funds subject to appropriation.

This critical premise of *Tiger Stadium* cannot survive the Supreme Court's determination in this case that the compacts are "valid contracts." *TOMAC*, 471 Mich at 312; 685 NW2d 221. It is a long-established principle of Michigan law that for a contract to be valid, it must be supported by consideration exchanged by both parties. *See, e.g., Yerkovich v AAA,* 461 Mich 732; 610 NW2d 542 (2000) ("An essential element of a contract is legal consideration"); *Higgins v Monroe Evening News,* 404 Mich 1, 21; 272 NW2d 537, 544 (1978) (ruling that gratuitous promises did not

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Ken Sikkema and Shirley Johnson, Appropriations Chair, attached as *Exhibit D.*

create an employment contract). Therefore, under Michigan contract law, for the compacts to be valid contracts, the State *must have given something* in return for the Tribe's net win payments and other obligations. It is axiomatic that a gratuitous exchange cannot be a contract and a contract cannot be a gratuitous exchange: "The most significant class of promises unenforceable for lack of consideration is made up of purely gratuitous (or gift) promises – promises for which there has been no exchange at all." A. Allan Farnsworth, Contracts, p 49 (2d ed., 1990). Accordingly, under the rationale of the Supreme Court's decision in this very case, the compact payments at issue in *Tiger Stadium* could not have been gratuitous payments, but instead are "State funds" subject to appropriation. To hold otherwise would make the compact promises unenforceable.

Of course, the same is true for the payment terms of the original compacts at issue in this case. Because the Supreme Court found that the original compacts were "valid contracts," they must have been supported by adequate consideration. The State, in other words, must have given something up in exchange for the payments. But this, in turn, means that the payment terms of the original compacts also required an "appropriation[] by law," and that the failure of the Legislature to approve the appropriation by legislative enactment violated the appropriation and separation of powers clauses of the Michigan Constitution. The Supreme Court did not address this issue, confining its ruling to the question of whether the enactment clause of the constitution required approval of the compact by bill. Accordingly, this Court can and should apply the logical consequences of the Supreme Court's decision in the first instance and hold the compacts'

appropriation clauses invalid, permitting the Supreme Court, if it so desires, to review the question on application.

III. The Constitutional Infirmity of the Payment Provisions of the Original Compacts and the Governor's Amendment Require Invalidation of the Entire Governor's Amendment and the Compacts Themselves.

The Odawa compact at issue here is identical in all material respects to the other three compacts the Legislature ratified by resolution. Among other things, each of the four compacts contains the same severability clause, which states:

> In the event that any section or provision of the Compact is disapproved by the Secretary of the Interior or the United States or is held invalid by any court of competent jurisdiction, it is the intent of the parties that the remaining sections or provisions of this Compact, and any amendments thereto, shall continue in full force and effect. *This severability provision does* ***not*** *apply to Sections 17 and 18 of this Compact.*

Compact (Ex A) § 12(E) (emphasis added). Section 17 of the compacts is the payment provision. Accordingly, if the payment provisions fail, the compacts are invalidated in their entirety. *See Dumas v Auto Club Ins Assoc*, 437 Mich 521, 537; 473 NW2d 652 (1991) (holding that if the terms of a contract are not severable, and part of the contract is void, the entire contract is unenforceable).

TOMAC has always maintained that a State's ratification of a gaming compact requires a legislative act, and TOMAC has filed a petition for Certiorari before the United

States Supreme Court to vindicate this point. This Court cannot and should not revisit the Michigan Supreme Court's holding; however, it is bound to follow the logical implications of that holding with respect to the compacts. Since all of the payment provisions here fail – the Governor's Amendment under *Tiger Stadium,* and the compacts as a whole under the contract analysis undertaken by the Michigan Supreme Court – the amendment provision and all four compacts, in their entirety, are invalid. This Court should therefore declare the four compacts void and unenforceable.

CONCLUSION

For the foregoing reasons, TOMAC respectfully requests that this Court declare unconstitutional the four gaming compacts as well as the Governor's Amendment of the Odawa compact.

Dated: November 5, 2004

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STATE OF MICHIGAN

IN THE COURT OF APPEALS

TAXPAYERS OF MICHIGAN AGAINST CASINOS, a Michigan non-profit corporation, and **LAURA BAIRD**, State Representative, Michigan House of Representatives, in her official capacity,

Plaintiffs/Appellees/
Cross-Appellants,

-v-

THE STATE OF MICHIGAN,

Defendant/Appellant/
Cross-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC. IV, a Florida corporation, and **GAMING ENTERTAINMENT (Michigan), LLC**, a Delaware limited liability company, **LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS**,

Intervening Defendants/
Appellants/Cross-Appellees.

Court of Appeals
No. 225017

Ingham County Circuit
Court No. 99-90195-CZ

INTERVENING DEFENDANT/APPELLANT/ CROSS-APPELLEE GAMING ENTERTAINMENT, LLC'S MOTION TO STRIKE ARGUMENTS ADVANCED IN SECTIONS II.B AND III OF PLAINTIFF/APPELLEE/CROSS-APPELLANT TAXPAYERS OF MICHIGAN AGAINST CASINOS' SUPPLEMENTAL BRIEF ADDRESSING COMPACT AMENDMENT

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Intervening Defendant/Appellant/Cross-Appellee Gaming Entertainment, LLC, ("GE"), by its attorneys Dykema Gossett PLLC, moves this Court under MCR 7.211(A) to strike Sections II.B and III of Plaintiff/Appellee/Cross-Appellant Taxpayers of Michigan Against Casinos' ("TOMAC") self-styled "Supplemental Brief Addressing Compact Amendment" ("Supplemental Brief"), in support of its motion, GE states as follows:

1. On July 30, 2004, the Michigan Supreme Court issued its Opinion remanding to this Court the sole question of "whether the provision in the compacts purporting to empower the Governor to amend the compacts without legislative approval violates the separation of powers

doctrine found in Const 1963, art 3, §2." *Taxpayers of Michigan Against Casinos v Michigan,* 471 Mich 306, 333; 685 NW2d 221 (2004).

2. On October 8, 2004, this Court issued an Order authorizing all parties in this case to "file briefs addressing (1) whether the provision in the tribal-state gaming compact of the Little Traverse Bay Band of Odawa Indians, purporting to allow the governor to amend the compact without legislative approval, violates the separation of powers clause, Const 1963, art 3, § 2, (2) assuming that the amendment provision in the compact is constitutional, whether any aspect of the exercise of the power to amend violated the separation of powers clause, Const 1963, art 3, § 2, and (3) what effect will there be on the amendment as a whole if an aspect of the amendment violates the separation of powers clause."

3. On November 5, 2004, TOMAC filed its Supplemental Brief with this Court.

4. In Sections II.B and III of its Supplemental Brief, TOMAC addresses far more than the compact amendment clause or the amendment itself, arguing that all payments made by the tribes pursuant to Section 17 of the *original* compacts violate the appropriation and separation of powers clauses of the Michigan Constitution. *See* Const 1963, art 9, § 17; Const 1963, art 3, § 2. Since Section 17 allegedly is not severable from the compacts, TOMAC further asks this Court to rule that the original compacts themselves are invalid.

5. The arguments advanced in Sections II.B and III of TOMAC's Supplemental Brief are far outside the scope of the remand by the Supreme Court, and also conflict with the clear mandate of this Court's October 8, 2004

Order. Consequently, GE was taken completely by surprise by TOMAC's improper attempt to raise these issues. Indeed, since the issues directed by the Courts to be addressed on remand were so narrow, and did not implicate GE's interests, GE chose not to file an initial brief on remand in order to preserve judicial economy and permit those parties with a stronger interest in these issues to be heard. GE does, however, have an interest in the validity of the compacts, the issue that has been litigated for five years and decided by the Supreme Court, and on which TOMAC now attempts to interject new arguments. Should this Court consider those arguments, GE would wish to be heard.

6. This Court should strike Sections II.B and III of TOMAC's Supplemental Brief because parties may argue on remand only those issues that are within the scope of the higher court's remand order. *See Toth v Autoalliance International Inc,* 246 Mich App 732, 740; 635 NW2d 62 (2001); *In re Osborne,* 237 Mich App 597, 611 n7; 603 NW2d 824 (1999); *People v Burks,* 128 Mich App 255, 257; 339 NW2d 734 (1983); *People v LeFlore,* 122 Mich App 314, 320; 333 NW2d 47 (1983).

7. By raising these issues now, TOMAC improperly attempts to expand this Court's jurisdiction beyond the scope of the Supreme Court's remand. As this Court has previously held, "[t]he power of a lower court on remand is to take such action as law and justice require **that is not inconsistent with the judgment of the [higher] appellate court**." *McCormick v McCormick,* 221 Mich App 672, 679; 562 NW2d 504 (1997) (emphasis added).

8. This Court cannot grant TOMAC's request and find that the original compacts are invalid as violative of

the separation of powers clause of the Michigan Constitution without conflicting with the Supreme Court's ruling that the compacts are valid. (TOMAC Supplemental Brief at 14-17). *TOMAC, supra.* Concerning the original compacts, the Supreme Court left open only the question of whether the gubernatorial amendment provision and/or its application in the context of the amendment to the LTBB compact violates principles of separation of powers. The Supreme Court did not direct this Court to consider, as TOMAC urges, whether the tribal payments provisions of the compacts, and by extension the compacts themselves, are constitutionally infirm. As such, this Court has no authority to make the ruling TOMAC seeks, and this Court should strike those portions of TOMAC's Supplemental Brief that raise these arguments.

9. This Court also should strike Sections II.B and III of TOMAC's Supplemental Brief because res judicata prohibits this Court "from considering issues not considered by the appellate court during a prior appeal, if the issues could have been raised on the prior appeal." *Hadfield v Oakland County Drain Comm'r,* 218 Mich App 351, 355; 554 NW2d 43 (1996). *See also Vanderwall v Midkiff* 186 Mich App 191, 196-201; 463 NW2d 219 (1990) (stating generally that "the principles of res judicata require that a party bring in the initial appeal all issues which were then present and could have and should have been raised"); *Arco Industries Corp v American Motorists Ins Co,* 232 Mich App 146; 594 NW2d 61 (1998), aff'd 462 Mich 896; 617 NW2d 330 (2000), (finding that an issue not raised when the case was first before the Court of Appeals could not be raised on remand).

10. TOMAC should not be permitted to advance a new argument that it could have (but did not) raise in its

initial complaint, or in proceedings before the Circuit Court, this Court, or the Supreme Court. TOMAC should recognize its loss on the issue of the nature of the compacts as contracts and the Supreme Court's clear ruling that the Legislature did not have to act by bill in approving the compacts, and should not be permitted to again relitigate this case, wasting judicial resources and further hindering resolution of this case that has been litigated ad nauseum. TOMAC's arguments in Sections II.B and III of the Supplemental Brief advance a mistaken theory that, since the compacts are contracts, this Court's earlier decision in *Tiger Stadium Fan Club Inc v Governor,* 217 Mich App 439; 553 NW2d 7 (1996), was in error. Although TOMAC had ample opportunity to raise this argument in its earlier pleadings, and although GE and the State of Michigan have argued from the beginning of this litigation that the compacts are in fact contracts, TOMAC chose not to make this argument until now. These arguments cannot and should not be made at this point in these proceedings.

11. Gaming Entertainment, LLC has filed a Motion for Immediate Consideration concurrently with this Motion, requesting that this Court immediately consider this Motion to Strike.

WHEREFORE, Gaming Entertainment, LLC respectfully requests that this Honorable Court grant its Motion for Immediate Consideration and also grant its Motion to

Strike, and strike Sections II.B and III from TOMAC's Supplemental Brief.

Respectfully submitted,

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Dated: November 12, 2004

Court of Appeals, State of Michigan

ORDER

Taxpayers of Michigan Against Casinos v State of Michigan	Donald S. Owens Presiding Judge
Docket No. 225017	Stephen L. Borrello
LC No.99-090195-CZ	Bill Schuette Judges

The Court orders that the motion for immediate consideration and the motion to strike are GRANTED.

Schuette, J. would grant the motion for immediate consideration and deny the motion to strike.

/s/ Donald S. Owens
Presiding Judge

[SEAL] A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

DEC 9 2004
Date

/s/ Sandra Schultz Mengel
Chief Clerk

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25 U.S.C. § 2710(d)

Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are –

(A) authorized by an ordinance or resolution that –

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that –

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection –

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to –

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that –

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over –

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that –

(I) a Tribal-State compact has not been entered into under paragraph (3), and

(II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court –

(I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and

(II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures –

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates –

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.